No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Whether the Order of the California Public Utilities Commission violates the First Amendment rights of the Pacific Gas and Electric Company by requiring the utility to foster and promote the views of a private organization by inserting that organization's fund-raising literature into the billing envelopes mailed to the company's customers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTERESTS OF AMICUS CURIAE, WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of cases dealing with the rights of businesses and individuals such as *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980). In addition, WLF has appeared before regulatory agencies which have sought to restrict the rights of businesses. In one such rulemaking proceeding which is implicated by a decision in this case, WLF opposed rules promulgated by the Federal Election Commission which would compel corporations and unions to allow political candidates, even those of the American Communist Party, to use corporate facilities and space for campaign purposes if their opponent had appeared on the corporate premises or at a corporate meeting or union convention. 11 C.F.R. § 114.4(a)(2). WLF believes that such intrusions by the government, including the Order by the California Public Utilities Commission in this case, are a dangerous infringement on basic First Amendment rights.

STATEMENT OF THE CASE

For purposes of judicial economy, *amicus* adopts by reference the Statement of the Case as presented by appellant Pacific Gas and Electric Company (PG&E) in its Jurisdictional Statement and brief on the merits.

In brief, the California Public Utilities Commission (CPUC) has determined that the "extra space" inside the billing envelopes sent by PG&E to its customers belongs to the ratepayers. "Extra space" is defined as the space remaining in the billing envelope, after inclusion of the bill and legal notices, for inclusion of other materials such that the extra weight will not result in any additional postage. CPUC then ordered that PG&E must allow a consumer group, Toward Utility Rate Normalization (TURN), to insert its fund-raising literature in that extra space four times a year.

While only the First Amendment issue has been directly raised in this case, implicit in this case is the question of the ownership of the extra space. *Amicus* submits that the extra space is owned by PG&E since PG&E, in effect, created that space by keeping the weight of the inserted materials below one ounce. PG&E could tomorrow lawfully increase the weight of the billing information by either increasing the weight of the paper stock used, or by increasing the print size, which would assist consumers who have poor eyesight, such that more paper is used. If the CPUC can control the use of the "extra space", then CPUC could create more extra space for use by TURN or others, by requiring PG&E to use lighter paper stock or smaller printing. Regardless of the ownership of the extra space, *amicus* nevertheless submits that the First Amendment issue is an important one.

SUMMARY OF THE ARGUMENT

The First Amendment rights of PG&E are violated by the CPUC Order requiring PG&E against its will to send out the fund-raising literature of a private organization. The Commission has failed to satisfy constitutional standards by failing to show that the Order serves a compelling governmental interest, is content-neutral, and is narrowly drawn to serve those interests. Accordingly, the Order must be struck down as violative of the First Amendment.

ARGUMENT

I. PG&E, OR ANY OTHER BUSINESS, HAS A FIRST AMENDMENT RIGHT NOT TO FOSTER AND ASSIST IN RAISING FUNDS OF A PRIVATE ORGANIZATION AND CANNOT BE COMPELLED TO INSERT THAT ORGANIZATION'S LITERATURE IN THE COMPANY'S BILLING ENVELOPES SENT TO ITS CUSTOMERS.

It is clearly established that appellant PG&E, as well as any other corporate entity, is entitled to First Amendment freedoms. *First National Bank of Boston v. Bellotti.* 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980). Accordingly, the question of whether or not appellant's First Amendment rights have been violated by the order of appellee Public Utilities Commission compelling PG&E to assist in promoting TURN or any other group can be answered by this Court's other First Amendment cases. *Amicus* submits that the Commission's order unconstitutionally forces PG&E to foster and promote the views of a third party with which PG&E disagrees and is in direct conflict with this court's ruling in *Wooley v. Maynard,* 430 U.S. 705 (1977).

In *Wooley,* the Court addressed an issue almost identical to the case at bar, namely, whether a person was required to display on his automobile objectionable language contained on the state's license plate ("Live Free or Die"). As the *Wooley* Court stated:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that State may not do so.

430 U.S. at 713.

The Court's holding in *Wooley* is dispositive of this case. Like the plaintiff in *Wooley,* PG&E is unconstitutionally forced "to participate in the dissemination of an ideological message by displaying it on [in] his private property in a manner and for the express purpose that it be observed and read by the public." *Id.*

This Court correctly reasoned in *Wooley* that the First Amendment not only forbids the state from restricting political or ideological speech, but also "guarantee[s] the concomitant right to decline *to foster* such" speech. *Id.* at 714 (emphasis added). In addition, the *Wooley* Court noted that the "passive act of carrying the state motto" is not as serious an infringement as compelling an affirmative act of a flag salute, but "the difference is essentially one of degree." *Id.* at 715. The Court stated, "[W]e are faced with a state measure which forces an individual . . . to be an *instrument for fostering* public adherence [support] to an ideological point of view he finds unacceptable." *Id.* at 715 (emphasis added).

The *Wooley* Court, noting that the statute required the objecting party to "use their private property" to promote the State's message, held that "[t]he First Amendment protects the right of individuals . . . *to refuse to foster*" objectionable ideas or speech. *Id.* at 715 (emphasis added).

Clearly, the order of the Commission infringes on PG&E's First Amendment right to refuse to use any of its property "to foster" or serve as "an instrument for fostering" the views of another organization and to serve as a fund-raising mechanism for that group. This is so whether the PG&E property is considered to consist of only the billing envelopes, or other PG&E property or resources such as the extra space, the labor and overhead involved in inserting the material, and other costs regardless of whether some of the costs may be reimbursable. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)).

Amici submit that the Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) is inapplicable to the instant case. In *PruneYard*, high school students set up a card table in a corner of PruneYard shopping center's courtyard seeking support against a United Nation's resolution against "Zionism." *Id.* at 77. The Court first noted that the record did not indicate any objection to this activity by PruneYard's patrons or customers.[1] *Id.*

The Court distinguished *PruneYard* from *Wooley* in three respects. First, and "[m]ost important, the shopping center *by choice of its owner*, is not limited to the personal use of the owners." *Id.* at 87 (emphasis added). Instead, it is "open to the public to come and go as they please." *Id.* In the instant case, however, PG&E has always chosen to use the billing envelopes to its own use and not for the public to use as it pleases. For that reason alone, this case is clearly more like the situation in *Wooley* than in *PruneYard.*

The second distinguishing fact articulated in *PruneYard* was that no specific message was dictated by the State to be displayed as in *Wooley*. However, this distinction is without merit since in either case, the state is compelling someone to foster or promote speech of someone else that he objects to. The principle is the same regardless of the identity of the speaker of the objectionable speech. Otherwise the *PruneYard* case might have been decided differently if the students were distributing literature not of their own writing, but, for example, a

[1] Although the bill inserts of TURN solicitations have not yet begun, *amici* submit that some customer objection to the TURN literature is likely. Further, if TURN were to include its own return envelope for contributions, which they may do, customers may inadvertently place their check for PG&E services into the wrong envelope, and thereby cause further confusion and resources to be expended by PG&E.

copy of a U.N. Resolution supporting Israel drafted by the United States Department of State.

Thirdly, the *PruneYard* Court distinguished *Wooley* by noting that the owner can disavow the message by going to the expense of "posting signs" in the area where the speakers are located. However, Justice Rehnquist, who wrote the *PruneYard* decision, noted in his dissent in *Wooley* that the owners of cars "could place on their bumper sticker explaining in no certain terms that they do not" agree with the "Live Free of Die" motto on the license plates. 430 U.S. at 722. In every case imaginable, the party forced to publicize the message of another could disavow its association with the messenger. Thus, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the newspaper could have easily printed a disclaimer disavowing the contents of a political candidate's reply which Florida law required to be published. Yet this Court held such a law to be unconstitutional even if the publisher faces no additional costs in complying with the reply law. *Id.* at 258. It should be remembered that technically speaking, newspapers, as a tangible object, have no First Amendment rights. It is the right of the publisher or any person or entity to publish a newspaper, newsletter, or other communication. Concomitantly, the First Amendment protects publishers or any other corporation or individual, from being forced to publish or transmit any one else's communication. Thus, even if the law in *Tornillo* required a political candidate to print his own reply on a flyer with disclaimers and to reimburse the newspaper for simply inserting the flyer in the newspaper, this Court would have similarly struck down such a law.

Consequently, the only relevant distinction between *Wooley* and *PruneYard* is the first and "most important" one noted, namely, the owner's decision to allow the public to use his space. As discussed, that distinction is inapplicable here. As Justice Powell stated in his concurring opinion in *PruneYard:*

> I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions not present in this case.

447 U.S. at 101.

Unless the decision of the Commission is reversed, the state would impermissibly transform private property (i.e., the envelopes or extra space) into a public forum or as a transmitter of objectionable messages.

II. THE STATE'S RESTRICTION ON PG&E'S FIRST AMENDMENT RIGHTS DOES NOT SATISFY THIS COURT'S TEST FOR REGULATING SPEECH.

While it is clear that PG&E's First Amendment rights are infringed by the Commission's order, the remaining question is whether the infringement of those rights can be constitutionally justified. *Wooley v. Maynard*, 430 U.S. at 716. *Amicus* submits that the reasons for such infringement cannot pass constitutional muster because the state has not demonstrated a compelling governmental interest furthered by the infringement, that the reasons are not content-neutral, and that regulatory measures designed to further the alleged governmental interest is not narrowly tailored or drawn to meet those interests. *City Council of Los Angeles v. Taxpayers For Vincent*, —— U.S. ——, 104 S.Ct. 2118, 2129 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A. The Governmental Interest Asserted Is Not A Compelling One.

The only state interest identified in the Commission's order is "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." This goal, however laudable, has never been demonstrated to be a compelling one. There has been no evidence that consumer participation and understanding has not achieved

a sufficiently high level such that CPUC proceedings were found to suffer in any significant way. Obviously, if all 3.7 million consumers of PG&E were to attend or testify at a CPUC hearing or proceeding, the Commission's work would come to a grinding halt. Thus, it is in CPUC's best interest *not* to have full participation by every customer in CPUC proceedings. Thus, the interest of assuring the "fullest possible" participation is a vague and undefined governmental interest that cannot justify an infringement on First Amendment rights.

Furthermore, there has been no showing that consumer interests are under-represented in CPUC proceedings, or that the marginal difference between their current level of representation by CPUC, TURN, and other groups, and some hypothetical higher level of representation constitutes a "compelling" governmental interest.

As for the other interest of assuring "the most complete understanding possible of energy-related issues," there also has been no showing that the current understanding is so deficient as to cause any significant problems with CPUC proceedings. What does CPUC mean exactly by assuring "the most complete understanding possible of energy related issues?" Many issues are "energy-related" ranging from the political situation in the Mid-East to the use of photo-voltaic cells. Surely, this vague governmental interest can hardly be considered a sufficiently compelling one to justify the state's infringement on First Amendment rights.

The burden is on the State to demonstrate a compelling government interest. *See Elrod v. Burns*, 427 U.S. 347, 362 (1976). The state has simply not met its burden of demonstrating a compelling governmental interest by merely suggesting some vague platitude or objective.

B. The Order Is Not Narrowly Drawn To Serve The Governmental Interests.

Even assuming, *arguendo*, that the interests articulated, *i.e.*, assuring the fullest possible consumer participation

and an understanding of energy-related issues, are compelling, it is clear that the order in question is not narrowly drawn to meet those goals.

In the first place, there is absolutely no assurance that TURN will use the extra space to further the objectives. CPUC has made it clear that it will not regulate the content of the material sent by TURN. TURN is free to communicate on any issue it wants or raise money in any way it chooses. It could, for example, offer premiums or devise other fund-raising devices not otherwise violative of state or federal law. Nothing prevents TURN from selling or leasing all or part of the space in its literature to commercial advertisers, thereby assuring itself of money "up front" rather than incurring huge costs for printing 3.6 million brochures in the hope that the public will respond sufficiently to defray some or all of the costs, or provide TURN with a profit. However, it is entirely possible that all such costs may *not* be recouped by TURN after their mailing and that the net amount available for TURN for activities before CPUC proceedings could well be less rather than more, thereby *decreasing* the level of consumer representation. Clearly, this would not advance the alleged governmental interest. The only way that the alleged governmental interest of "assuring" further participation will be realized, is to "assure" TURN that its fund-raising efforts will be successful. Obviously, CPUC does not appear to be willing to guarantee TURN's fund-raising efforts.

Even assuming that TURN realizes a profit from their fund-raising efforts (*i.e.*, funds raised exceed printing costs and other costs imposed by CPUC such as accounting and preparing an annual report) there is no guarantee that those profits will necessarily be transformed into greater consumer participation before CPUC proceedings. The CPUC Order, Paragraph 5(f) states that "[f]unds received shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E." As noted earlier, presumably the order would

mean only *net* funds received after subtracting all the costs associated with the fund-raising efforts. If the order were taken literally to mean gross funds, TURN could easily argue that the fund-raising costs incurred were "related to ratepayer representation" and thus, a proper expenditure of those funds. However, there is nothing in the Order to prevent TURN from using the funds received in place of funds currently expended by TURN. Thus, they could substitute those funds raised by the Commission's order for funds currently allocated by TURN for Commission proceedings. In that case, the governmental interest is not advanced any more than what it originally was without the Order.

Furthermore, even if there were a profit and the funds generated were used in addition to other funds already allocated by TURN, there is no guarantee that the additional funds would necessarily increase ratepayer representation before CPUC. For example, TURN could merely increase the current salaries of its officers, staff, and consultants without any concomitant increase in ratepayer participation. Or they could use the money for larger office space or other overhead and justify it on the grounds that the expenses are "related" to Commission proceedings.

In short, the Order is not narrowly drawn to advance the compelling governmental order asserted. Other methods exist which are more appropriate for promoting consumer representation such as reimbursement for attorneys' fees and costs to those groups who participate in proceedings and whose participation CPUC found to be useful in their deliberations. Only in such a scheme is the CPUC "assured" that the governmental interest is promoted. Accordingly, the Order is not narrowly drawn.

C. The Commission's Action Was Impermissibly Based on the Content of Speech.

Amicus submits that the Commission's action also fails to satisfy the test of content-neutrality in regulating

speech. Admittedly, the Order on its face states that the Commission will not examine the content of either TURN's or PG&E's literature. However, it is clear that in order to reach the decision granting TURN access to PG&E's envelopes, the Commission improperly engaged in examining the content of PG&E's literature. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 537.

If, however, CPUC were to demonstrate that its action was not content-based, then CPUC's action has failed to demonstrate that the governmental interest is furthered since, as noted earlier, TURN could use the space for commercial advertising or other purposes not related to energy issues. In short, CPUC cannot have it both ways. Either its action was premised on the content of speech, or if it is not, the Order does not advance the governmental interest asserted.

CONCLUSION

For the foregoing reasons, *amicus* submits that the actions of the CPUC in forcing PG&E to foster the views of a private organization by requiring PG&E to disseminate the fund-raising literature of that group is violative of the First Amendment. As a matter of constitutional law and the public interest, the decision by CPUC must be struck down.

Respectfully submitted,

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